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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE JURISDICTIONAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.1 of the Supreme Court of the United States, the Attorney Ad Litem herein moves and requests permission from the Court to file the attached Jurisdictional Brief of Amicus Curiae in support of Petitioner. Petitioner's written consent to file this Amicus Curiae is presently on file with the Clerk of Court. Written consent of Respondent was requested herein, but has not yet been received or denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one original and forty copies of Jurisdictional Brief of Amicus Curiae in Support of Petitioner and Motion for Leave to File therein has been furnished by United States Mail this 30th day of December, 1983, to the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543; and that one copy thereof has likewise been furnished to Judge Philip G. Nourse, 19th Judicial Circuit, Room 309, St. Lucie County Courthouse, Ft. Pierce, Florida 33450,; K.C. Collette, Esquire, Department of Health & Rehabilitative Services, 1323 Winewood Boulevard, Tallahassee, Florida 32301; and Michelle Russell, Assistant State Attorney for the 19th Judicial Circuit, Post Office Drawer 4401, Ft. Pierce, Florida 33454.

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BRIEF OF AMICUS CURIAE OFFICE OF THE PUBLIC DEFENDER AS ATTORNEY AD LITEM IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Eighth and Fourteenth Amendment to the Constitution compel restricting the liberty of an adjudicated chronic juvenile runaway and command placement in appropriate facilities when that child refuses statutory treatment and rehabilitation and is free to, and continues to, runaway?

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INTEREST OF THE PUBLIC DEFENDER AS ATTORNEY AD LITEM

The Office of the Public Defender, which files this brief with the written consent of Petitioner, has a direct interest in this case. The court has appointed this office to serve as attorney ad litem for this indigent juvenile runaway pursuant to Florida Law[1] and this Court's decision in Gault.[2] Therefore, as attorney ad litem, this office is expressly and ethically

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[1] Florida Statute §39.071 provides, inter alia, for appointment of counsel in proceedings relating to juveniles.

[2] In the matter of the application of Paul L. Gault, et. al., 387 US 1, 18 L ed 2d 527, 87 S.Ct. 1428(1967).

obliged and interested to ensure that this chronic juvenile runaway receives proper care, guidance and control which serves her moral, emotional, mental and physical welfare as well as the best interests of the state.

This office also has a generalized interest in this case since it is appointed to represent all indigent juveniles, not only those who chronically runaway, in judicial proceedings before the court where the child's best interest are at issue. Not incidentally, this office is routinely appointed to criminally represent and zealously defend persons accused of acts against children,

such as runaways or abductees, where there is substantial likelihood that the alleged act would not have occurred to children such as Wendy Shaw had the child been receiving treatment, rehabilitation or supervision.[3]

Amici's participation and interest in this case is fundamental, vital, and obvious.

SUMMARY OF THE ARGUMENT

Although the Supreme Court of Florida has long held that Petitioner has inherent jurisdiction to entertain

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[3] E.g., amici has been appointed by the Court to represent the self-confessed killer of Adam Walsh; a case which prompted nation-wide interest and the Congress to pass legislation regarding Runaway and Missing Children during its last session.

matters pertaining to custody and enter any orders appropriate to children's welfare, and that, independent of statute,[4] Petitioner has inherent jurisdiction to control and protect infants, Cone v. Cone, 62 So. 2d 907 (Fla. 1953), the appellate court below refuses to acknowledge the constitutional injury worked upon a chronic juvenile runaway, Wendy Shaw, who repeatedly declines statutory treatment and rehabilitation and continues to runaway at whim. Indeed following the appellate court's writ of prohibition herein, Wendy Shaw, ranaway from the Respondent

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[4]Petitioner's jurisdictional authority to enfore Wendy Shaw's constitutional rights herein derive from Florida Statute §39.01(21) wherein legal custody creates "the right and duty to protect, train, and discipline . . . and to provide . . . food, shelter, education, and ordinary . . . care". (emphasis added).

state agency charged with her treatment and rehabilitation for the eleventh time.

Petitioner and amici contend that the least restrictive alternative available to statutorily treat and rehabilitate an adjudicated chronic juvenile runaway is to minimally restrict her liberty within an appropriate treatment facility when that child continuously refuses to physically remain within the custody and control of the state and further advises that she will continue to runaway.

This Court first recognized in In re Gault, 387 U.S. 1 (1967), that due process considerations attach to children in pretrial juvenile delinquency proceedings which may lead to commitment

in a state institution and must measure up to the essentials of due process and fair treatment. These due process considerations were later extended and applied by this Court to the trial proceedings of juveniles. Kent v. United States, 383 U.S. 541 (1966); In re Winship, 397 U.S. 358 (1970).

Amici asserts that post-adjudicatory rights of juveniles is a question of first impression for the Court and that constitutional due process considerations also legally reach juveniles in post-adjudicatory proceedings when the child's best interests require restraining her liberty and capacity to chronically runaway in order that she may receive care,

guidance and control which serves her moral, emotional, mental and physical welfare as well as the best interest of the state.

It is further alleged that the Eighth Amendment to the United States Constitution prohibits a state agency from habitually placing an adjudicated chronic juvenile runaway in inappropriate facilities which not only permits, but knowingly encourages that child to evade, at whim, the treatment which she requires.

ARGUMENT

I. PLACEMENT OF AN ADJUDICATED CHRONIC JUVENILE RUNAWAY IN INAPPROPRIATE FACILITIES WHICH PERMIT AND ENCOURAGE THAT CHILD TO CONTINUOUSLY ESCAPE AND EVADE STATUTORY TREATMENT AND REHABILITATION VIOLATES THE EIGHTH AMENDMENT.

This Court and lower federal courts have long recognized that the Eighth Amendment applies to the alleged "non-criminal" context of the juvenile process and that juvenile institutions are sufficiently analagous to the criminal setting to deserve constitutional protection. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977); In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975);

Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), aff'd, 491 F. 2d 352 (7th Cir. 1974) cert.den., 417 U.S. 976 (1974). Indeed, it is clear that children are more deserving of especial protection under the cruel and unusual punishment standard:

> Under the Eighth Amendment children who remain unconvicted of any crime may not be subjected to devastating psychological and reprehensible physical conditions, and while other juvenile cases are not strictly on point, they recognize that juveniles are different and should be treated differently. Thus, the evolving standards of decency that mark the progress of a maturing society require that a more adequate standard of care be provided for pre-trial juvenile detainees.

Swansey v. Elrod, 386 F. Supp. 1138, 1143 (N.D. Ill. 1975); See also, Kent v. United States, 383 U.S. 541 (1966).

Amici contends that the especial protection afforded children in Swansey, supra, and first recognized by this Court in Kent is, at a minimum, at least as applicable to Wendy Shaw's post-adjudicatory treatment and rehabilitation where Wendy, and others, face indifference and neglect by a state agency who unconstitutionally and callously ignores their health, safety and welfare by permitting these children to persistently leave their custody and control at any time.

This Court has specifically refused to countenance such conduct in the post-adjudicatory adult setting when it held that deliberate indifference to medical

and psychological needs violates the Eighth Amendment, Estelle v. Gamble, 429 U.S. 97(1976); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) and has been followed closely by other courts who, assessing the totality of the conditions, have determined that practices which are "shocking to the conscience of reasonably civilized people" are constitutionally untenable. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); aff'd, 442 F. 2d 304 (8th Cir. 1971) aff'd sub nom Hutto v. Finney, 437 U.S. 678 (1978). See also, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) aff'd in part and rev'd in part, sub nom., Newman v. Alabama, 559 F.2d. 283 (5th Cir. 1977)

cert. denied, 98 S. Ct. 3144 (1978); Battle v. Anderson, 564 F. 2d 388 (10th Cir. 1977).

By parity of reasoning, unless this Court repudiates its landmark decisions in Gault and Ingraham, supra, and concludes that the Constitution's reach falls short of protecting children at least as equally, if not more so than it does others at the post-adjudicatory stage, it must logically hold that treatment and rehabilitation of children require the physical presence of the child to be constitutionally meaningful.

II. DUE PROCESS REQUIRES RESTRICTING THE PHYSICAL LIBERTY OF AN ADJUDICATED CHRONIC JUVENILE RUNAWAY TO EFFECT STATUTORY TREATMENT WHEN NO LESS RESTRICTIVE REHABILITATIVE ALTERNATIVE IS AVAILABLE WHICH IS REASONABLY RELATED TO THE BEST INTEREST OF THE CHILD.

In evaluating treatment alternatives where fundamental liberty is infringed by the government, this Court established in Shelton v. Tucker, 364 U.S. 479 (1960), that:

> Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of the . . . abridgement must be viewed in the light of less drastic means of achieving the same basic purpose.

Id. at 488.

Petitioner and amici contend that the statutory, legitimate and substantial interest to treat and rehabilitate an adjudicated chronic runaway child who informs Petitioner that she will continue to runaway, and repeatedly does so despite Petitioner's order, requires protecting the child from her own improvidence and that of others by restricting her physical liberty in order to realistically commence statutory treatment and rehabilitation.

The "right to treatment" has been defined as such treatment "as will give (the individual) . . . a realistic opportunity to be cured or to improve his or her mental condition." Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.

1971) aff'd in part 503 F. 2d 1305 (5th Cir. 1974). It is axiomatic that no realistic opportunity to cure or improve Wendy Shaw's mental condition can exist, whatsoever, without her participation and physical presence throughout the treatment process.[5] Federal and state courts have historically recognized the distinct and fundamental constitutional underpinnings of such due process claims, particularly in the mental health arena.

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[5]Respondent state agency convinced the appellate court below that Petitioner directed the specific placement and treatment of Wendy Shaw contrary to state law and that the Petitioner's order was in derogation of the doctrine of separation of powers. This is factually untrue and legally erroneous. Petitioner ordered Respondent agency to

See e.g., Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) aff'd, 525 F. 2d 987 (8th Cir. 1975); Rouse v. Cameron, 373 F. 2d 451 (D.C. Cir. 1966), reversed on other grounds, 387 F. 2d 241 (D.C. Cir. 1967); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Renelli v. Dept. of Mental Hygiene, 340 N.Y.S. 2d 498 (1973); Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E. 2d 908 (1968). Since the juvenile process

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provide a "secure" facility for the child upon learning from the agency that the facility it designated to treat Wendy Shaw had removed its fence years ago for unknown and unjustified reasons and that a "secure" facility did not exist in the State of Florida for chronic female juvenile runaways.

Further, Petitioner has never suggested to Respondent state agency how to professionally treat this child. While the child's constitutional rights cry out for attention from this Court, the issue of separation of powers is non-existent.

as well as mental health considerations are similarly based on the parens patriae theory that the state may restrict the liberty interest of individuals for purposes of treatment and rehabilitation, a non-statutory constitutional right to treatment has emerged during the landmark juvenile cases of the 1970's and is now recognized by many lower federal courts. See, Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) rev'd on other grounds, 562 F.2d 993 (5th Cir. 1977); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), aff'd, 491 F. 2d 352 (7th Cir. 1974) cert. denied, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F. Supp. 579(S.D. N.Y. 1972) enforced, 359

F. Supp. 478 (S.D. N.Y. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972).

If treatment for chronic runaways who, by their recurring status, habitually absent themselves from Petitioner's jurisdiction and the custody and supervision of state treatment agencies is to have meaning, Petitioner and amici request the Supreme Court of the United States to recognize that no less restrictive alternative exists to treat and rehabilitate Wendy Shaw; and that these children have a pronounced constitutional interest in growing-up, healthy, and disappearing into adults and productive citizens of these United States.

CONCLUSION

For the reasons stated above, certiorari is requested from the Supreme Court of the United States.

Respectfully submitted,

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